**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO. 70 OF 2003**

Prakash Balkrishna Deo
aged about 42 years,
Occupation: Business,
residing at Nandgao,
District: Nashik. .... Appellant.
(Original Petitioner.)

Versus.

Rohini alias Rajani w/o.
Prakash Deo, aged about 37 hrs.,
occupation: Household,
residing at C/o.Sitaram Dagadu
Wani, Bhoi Lane, Chalisgaon,
District Jalgaon. .... Respondent.
(Original Respondent.)

Smt.S.S.Deshpande for the Appellant.

Shri P.K.Dhakephalkar for the Respondent.

**CORAM : ABHAY S. OKA, J.**

**DATED : 27th August, 2004.**

**ORAL JUDGMENT.**

1. By order dated 29th June 2004, the parties were informed that the Appeal will be taken up for final disposal at admission stage. Accordingly on 29th July 2004 and on 10th August 2004, I have heard the Counsel appearing for the parties. Since the Second Appeal is of the year 2002 arising out of a petition for divorce filed in the year 1992 and since the parties are residing separately from the year 1986, I have heard the

appeal finally.

2. The following substantial questions of law arise in the Second Appeal:

(1) Whether the Appellate Court committed serious error by holding that the decree of divorce can be passed in a rare case and that the case before him was not a rare case in which the decree for divorce is not inevitable ?

(2) Whether the Appellate Court committed a serious error by setting aside decree passed on the ground of desertion without assigning any specific reason ?

(3) Whether the Appellate Court committed an error by accepting that the Appellant was keeping a mistress only on the basis of photograph at exhibit 30 ?

I have heard the learned Counsel appearing for the parties on the aforesaid substantial questions of law.

3. With a view to appreciate the contentions raised by the Counsel appearing for the parties, it is necessary

to refer to the facts of the case. The marriage between the Appellant and the Respondent took place on 14th May 1993. The case of the Appellant is that the Respondent was very short tempered and was in the habit of picking up quarrels and on one occasion she made preparation to commit suicide by pouring kerosene on her person. The Respondent used to insist that the Petitioner should reside separately from his parents. Therefore, the Appellant started staying separate from his parents. When the Respondent was pregnant she left the matrimonial home in the 7th month of pregnancy and stayed with her parents for a period of six months. Respondent delivered a female child. During her second pregnancy she left for her parents house. After delivery of the female child the Appellant visited house of the Respondent's parents and met her. However, the Respondent behaved arrogantly and demanded decree of divorce. The case of the Appellant is that the Respondent underwent family planning surgery without his consent. A notice was given by the Appellant to the Respondent. As no compliance was made with the notice, a petition under section 13(1) of the Hindu Marriage Act, 1955, was filed by the Appellant against the Respondent claiming divorce on the grounds of cruelty and desertion.

4. The Respondent contested the petition by filing

Written Statement. The Respondent denied various allegations made by the Appellant. The case of the Respondent is that the Appellant has kept a mistress. It is her case that she had to undergo surgery for removal of tumour and has not undergone family planning surgery as alleged.

5. The learned trial Judge passed a decree of divorce under section 13(1)(i)(a) and 13(1)(i)(b) of the said Act of 1955 by accepting the ground of cruelty and desertion.

6. An appeal was preferred by the Respondent-wife. In the appeal Judgment and Decree passed by the trial Court has been set aside. The Appellate Court held that in the photograph produced at Exh.30 it is shown that the Appellant is sitting with a lady. The Appellate Court held that there was no explanation offered by the Appellant in respect of the said lady and therefore, the case made out by the Respondent-wife that the Appellant has kept a mistress will have to be accepted and will have to be taken as a sufficient ground for the Respondent to stay away from her husband. The Appellate Court also set aside the decree of divorce passed on the ground of cruelty. The Appellate Court accepted the case of the Respondent that she has not undergone family planning surgery and she was required to be operated

upon for removal of tumour and in the said surgery uterus and ovaries were required to be removed. In such circumstances, the Appellate court held that undergoing such surgery did not cause any cruelty to the Respondent.

7. Being aggrieved, the decree passed by the Appellate Court has been challenged in the present appeal by the husband. The learned Counsel for the Appellant submitted that a clear finding was recorded by the learned trial Judge that desertion was established by the Appellant. She submitted that the finding recorded by the trial Court on the issue of desertion is not specifically set aside by the Appellate Court. She pointed out that the finding on the ground of desertion recorded by the trial Court is not based on notice at Exh.27. She pointed out that the Respondent deserted the Appellant from the year 1986 and the notice at Exh.27 was sent on 11th December 1992 recording the act of desertion on the part of the Respondent. She submitted that the Appellate Court completely misdirected itself by holding against the Appellant only on the basis of the averments made in the notice. She submitted that merely because in photograph at Exh.30 some lady is seen to be sitting by the side of the Appellant, it cannot be concluded that the Appellant has kept a mistress. She submitted that even assuming that

the case made out by the Respondent regarding undergoing surgery was correct, the fact remains that she underwent the surgery without the consent of the Appellant in which uterus and ovaries were removed. She submitted that this itself is sufficient to hold that the ground of cruelty was established.

8. The learned Counsel appearing for the Respondent submitted that there was never any genuine desire on the part of the Appellant to cohabit with the Respondent. He submitted that from the averments made in the notice at Exh.27, the Appellate Court has rightly found that the socalled offer given by the Appellant to cohabit with the Respondent was not at all genuine offer and therefore, the Appellate Court was justified in setting aside the decree passed on the ground of desertion. He submitted that if the Respondent was required to be operated upon for removal of tumour and if while performing the said surgery uterus and ovaries were required to be removed, the Appellant cannot be blamed for the same. He submitted that there was absolutely no ground available to pass a decree on the ground of cruelty. He submitted that the presence of another lady in the photograph at Exh.30 was sufficient to accept the case of the Respondent that the Appellant has kept a mistress. He pointed out that the Respondent has two daughters and only a meagre amount by way of maintenance

has been awarded to the Respondent and two daughters, who were minors and the Appellant cannot be absolved of responsibility of maintaining the Respondent and his two minor daughters. He submitted that as the findings recorded by the Appellate Court are purely findings of fact, no interference can be made in an appeal under section 100 of the Code.

9. I have considered the rival submissions and findings recorded by the Courts below. The marriage between the Parties was solemnised on 14th May 1983. The case of the Appellant is that the Respondent voluntarily left the matrimonial home in June 1986 without informing the Appellant. A consistent case was made out by the Appellant in his pleadings, in his evidence and in the notice at Exh.27 dated 11th November 1992. The trial Court relied upon the admission given by the Respondent in the cross-examination that she has been residing with her parents since the year 1986. The trial Court also found that there was variance between the pleadings of the Respondent and her oral testimony. The trial Court relied upon the notice dated 11th November 1992 at Exh.27 for pointing out that in the said notice the Appellant asserted that the Respondent deserted him from 1986 and she had not come back and that there was no reply given by the Respondent controverting the contents of the notice though the same was duly served on the

Respondent. Thus the trial Court accepted the case made out by the Appellant that the Respondent left the matrimonial home in the year 1986,. The findings of the Appellate Court show that the Appellate Court has referred to the notice at Exh.27 and has stated that by this notice the Respondent was not called upon to resume cohabitation. So far as the finding recorded by the trial Court that the Respondent left the matrimonial home in June 1986 is concerned, the same is not specifically disturbed by the Appellate Court. The Appellate Court totally ignored that the notice at Exh.27 was not relied upon by the Appellant as an evidence of his request to the Respondent to resume cohabitation. The notice was issued prior to the filing of the divorce petition recording that the Respondent has deserted him. The trial Court has relied upon Exh.27 for limited purpose. The trial Court has held that though a specific case was made out in the notice that the Respondent deserted the Appellant in the year 1986, no reply was sent to the said notice by the Respondent for controverting the contents thereof. Therefore, even if by the notice at Exh.27 the Appellant has not called upon the Respondent to resume cohabitation, the same will not have any effect on the merits of the ground of desertion as the case made out is that the Respondent deserted the Appellant from the year 1986 and as she refused to stay and cohabit with

the Appellant, a legal notice was required to be issued prior to the filing of the petition for divorce.

10. The photograph at Exh.30 has been relied upon by the Respondent to show that the Appellant has kept a mistress. All that the Appellate Court has held is that the Appellant stated in his cross examination that his family members were shown as present in the photograph at Exh.30 and he has failed to give explanation about the lady who is seen sitting near to him in the said photograph. The learned Judge has held that the presence of the lady seen from the said photograph itself is a sufficient ground for the Respondent to stay away from the Appellant. The trial Court has considered the conduct of the Respondent. The Respondent even after receiving the notice sent in the year 1992 at Exh.27 did not come out with the case that the Appellant has kept a mistress. From 1986 onwards when she started residing separately, the Respondent has never protested about the alleged action of the Appellant of keeping the mistress. The case to that effect was made out for the first in the written statement which was filed in June 1993. It is not the case of the Respondent that any time after 1986 she was aware that the Appellant had kept a mistress and for that reason she declined to resume cohabitation with the Appellant.

11. Therefore, so far as the factum of separation from June 1986 is concerned, the finding recorded by the trial Court is not disturbed by the Appellate Court. So far as the period of desertion is concerned, the same has started from June 1986 and it is not the case of the Respondent that any time till the filing of the petition, cohabitation was resumed. There is nothing brought on record on behalf of the Respondent that she made attempts to resume cohabitation with the Appellant any time after June 1986 and that the Appellant himself was not interested in resuming cohabitation. On the contrary before the Appellate Court, a contention has been raised by the Respondent that as the Appellant has kept a mistress, the Respondent not not expected to live with the Appellant. Though the order of maintenance has been passed under section 125 of the Code of Criminal Procedure, 1973, the findings recorded in the said proceedings are not binding on the Civil Court. Therefore, the trial Court came to the conclusion that there was ’animus deserendi’ on the part of the Respondent. Merely because a lady who is a stranger to the family is seen next to the Appellant in a solitary photograph, the same cannot be said to be a proof of a mistress being kept by the Appellant. The Appellate Court has also not recorded a positive finding to that effect against the Appellant except by saying that the photograph at Exh.30 creates "doubt and support the case

made out by Rohini". In paragraph 14 of the Judgment of the Appellate Court, what has been stated by the learned Judge is as under:

> "Thus, Prakash is not justified in claiming the relief of divorce on the ground of cruelty and desertion. I would like to point out that only in rare case, decrees of divorce can be granted. In the present matter Prakash and Rohini have two daughters. Considering the allegations made against each other by them, I am of the opinion that this is not the rare case in which decree for divorce is not inevitable."

The leaned Judge seems to be under the impression that the decree for divorce can be granted only in a rare case. The said approach is incorrect for the simple reason that whenever a case is made out on evidence for grant of decree a of divorce under the provisions of the Hindu Marriage Act, 1955, decree will have to be passed unless a case is made out which is covered by clause (b) of sub-section (1) of section 23 of the said Act of 1955. Therefore, the approach of the Appellate Court as reflected from the aforesaid paragraph No.14 seems to be contrary to law.

12. Without setting aside the specific finding recorded by the trial Court as regards desertion from the year 1986 and without disturbing the findings of the trial Court on existence of animus deserendi, the Appellate Court has set aside the decree on the ground of desertion by placing reliance only on the Exhibit 27 and Exhibit 30. Therefore, it is very clear that the finding of the Appellate Court on this aspect is recorded without even considering the oral evidence led by the parties. If a finding is recorded by the Appellant without adverting itself to the oral evidence on record and without considering the effect of oral evidence, the same raises substantial question of law calling for interference in the Second Appeal. Therefore, in my view, the finding of the trial Court on the issue of desertion will have to be restored.

13. So far as the ground of cruelty is concerned, the trial Court has recorded that the Respondent has undergone operation without the consent of the Appellant-husband. The trial Court accepted the fact that both the ovaries, fallopian tube and uterus have been removed from the body of the Respondent. The trial Court was impressed by the denial of the Respondent regarding the allegation of undergoing family planning surgery. It may not be in dispute that such parts of the body were not required to be removed in family

planning surgery. The trial Court thereafter proceeded to record a finding paragraph No.16 as under:

> "Admittedly, the petitioner and the respondent does not have a son. Though for the purpose of family planning programme statement that 2 or 3 issues are sufficient is correct, it is a directive to the citizens at large and presently not a law. Hindus follow the age old tradition and I have not seen any Hindu who has honestly said that he does not have a desire to have son. Such is a importance of son as is believed or desired by a common Hindu and the desire has a religious backing. To have a son by the adoption is a matter of adjustment by the person with the life. Nevertheless a longing of son is always there hidden in some corner of the heart, is a naked truth. Here I do not mean to say that such longings are always satisfied or fulfilled and things take course as planned, however, the longings are longings. In such circumstances, it cannot be stated that the petitioner has no desire to have a son. However, the petitioner is deprived of his longings to fulfill the desire of a son by the respondent. Here I do

not want to underestimate the joy which one gets after getting a daughter born. One question which any married lady may ask to herself sincerely that whether she has such longing to have a son? The majority answer shall come as "yes" ion this background, the act of the respondent whereby she got her ovaries, fallopian tubes and uterus removed without the consent of her husband cannot be justified. Particularly so when it is not proved on the record that it was necessary for saving her own life. I am, therefore, constrained to hold that by doing such acts, the respondent has practiced mental cruelty on the petitioner within the meaning of section 13 of the Hindu Marriage Act."

14. The Appellate Court has relied upon the evidence of Dr.Patil who has stated that he performed a surgery for removal of a tumour. The Appellate Court has disbelieved the case of the Appellant that the Respondent underwent family planning operation.

15. There was obviously no evidence on record to show that the Respondent underwent family planning operation. No woman will allow removal of uterus and ovaries as well as fallopian tube very easily. Once it is

established that the Respondent did not undergo family planning operation, merely because there is no possibility of a son being born to the Respondent, one cannot reasonably come to the conclusion that mental cruelty was caused to the Appellant. The observations of the trial Court in paragraph No.16 are contrary to the evidence on record. Hence the Appellate Court was right in holding that ground of cruelty is not established.

16. Under section 25 of the said Act of 1955, a decree for permanent alimony and maintenance can be passed. However, there is no sufficient material placed on record regarding the income of the Appellant. it is an admitted position that as per the order passed under section 125 of the Code of Criminal Procedure, 1973, the Appellant is required to pay monthly maintenance of Rs.250/- to the Respondent and a sum of Rs.100/- to the two daughters. The said amount awarded by the Criminal Court cannot be said to be prima facie adequate. However, in the absence of any concrete evidence on record, no finding can be recorded regarding the exact quantum of maintenance to which the Respondent is entitled to. However, it will be open for the Respondent to adopt proceedings under section 18 of the Hindu Adoption and Maintenance Act, 1956, for claiming appropriate amount of maintenance for herself and for

the two daughters in addition to the amount of maintenance awarded under section 125 of the said Code of 1973. It will also be open for the Respondent to apply for enhancement of the maintenance granted under section 125 of the said Code of 1973.

17. The Respondent was required to contest the litigation upto this Court. She is, therefore, entitled to the cost of the legal proceedings. The said amount is quantified at Rs.15,000/-.

18. Hence the following order is passed:

(i) The Second Appeal is partly allowed. Findings recorded by the Appellate Court as regards the ground of cruelty covered by clause (i)(a) of sub-section (1) of section 13 of the said Act of 1955 is confirmed. However, the findings given by the Appellate Court as regards the ground covered by clause (i)(b) of sub-section (1) of section 13 of the said Act of 1955 is liable to be set aside.

(ii) The marriage between the Appellant and

the Respondent is hereby dissolved by a Decree of of divorce under section 13(1)(i)(b) of the said Act of 1955.

(iii) The Appellant shall pay a sum of Rs.15,000/- to the Respondent by way of costs of the proceedings in the trial Court, Appellate Court and this Court. The said amount shall be deposited in the trial Court within a period of eight weeks from today. The decree of divorce passed by this Court will operate only after the cost of Rs.15,000/- is paid by the Appellant to the Respondent or the said amount is deposited by the Appellant in the trial Court.

(iv) It will be open for the Respondent to take out appropriate proceedings in the light of the observations made hereinabove for seeking additional amount by way of maintenance for herself and for minor daughters.

(v) Certified copy expedited.

**Judge.**